United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Docket No. 75-7555

IN THE

United States Court of Appeals

For the Second Circuit

B

P/S

THOMAS C. GANGEMI, as President of the SYRACUSE DRAFTSMEN'S ASSOCIATION,

Appellee,

— v —

GENERAL ELECTRIC COMPANY,

Appellant.

On Appeal from the United States District Court
Northern District of New York

REPLY BRIEF FOR APPELLANT,
General Electric Company

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REPLY BRIEF FOR APPELLANT,
General Electric Company

PRELIMINARY STATEMENT

This is a Reply Brief submitted by the General Electric Company ("Company") in response to the brief of the Syracuse Draftsmen's Association ("Union").

POINT I

THE FACT THAT THE PARTIES INTENDED PERMISSIVE ARBITRATION OF NON-DISCIPLINARY GRIEVANCES IS UNCONTROVERTED.

The controlling factor in any dispute over the meaning of contract language is the intent of the parties. 4 Williston On Contracts, W. H. E. Jaeger (3rd Ed), §§ 600-601; Mallad Construction Corporation v. County Federal Savings and Loan Assn., 32 N.Y.2d 285, 291 (1973). Thus, the most significant evidentiary fact before this Court is that the Union asserted in sworn pleadings and affidavits that the arbitration clause was not intended to be mandatory with respect to non-disciplinary grievances.

Specifically, Thomas C. Gangemi, the Union President, submitted sworn affidavits to state and federal courts asserting that there was "no binding arbitration provision... with respect to this matter" because "pursuant to Article IV

of the parties' collective bargaining agreement any grievance excluding a disciplinary penalty may not proceed to arbitration unless both parties mutually agree in writing" (69,70). See Exhibits A and B, attached hereto. The Union also verified in a State court pleading that the arbitration clause was non-mandatory with respect to the matter at issue in this case (69). See Exhibit C, attached hereto.

The Union does not dispute that it made these sworn revelations concerning its understanding of the arbitration clause. Rather, it has steadfastly ignored this most critical factor in all of its responsive papers before this Court.

The Company has always shared the Union's understanding that arbitration of non-disciplinary grievances can occur only by mutual consent. The Union's assertion that the Company took a contrary position in Gangemi I is inaccurate and an explanation must be made to set the record straight (U 5,6).* In Gangemi I, the Union sought injunctive relief under §301 of the Labor Management Relations Act of 1947, asserting that it had no adequate remedy at law because the arbitration clause was permissive and the Company was

*References in this form are to pages of the Union's "Brief for Appellee."

not likely to consent to arbitration of the grievance. The Company acknowledged in response that the arbitration clause was indeed permissive but argued that merely because one party may not consent to arbitration does not relieve the other party from at least attempting to resolve the dispute within the contractually agreed-upon framework before being permitted to seek court relief for breach of contract.

The Company argued further that the Union had not attempted to exhaust its contract remedies because it had not completed the second step of the three-step grievance procedure and had not requested the Company to submit the dispute to voluntary arbitration. The Company cited as authority the decision of the Supreme Court in Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967), which held that an employee must attempt to exhaust the contractual grievance procedures before bringing an action for breach of contract, notwithstanding the fact that he, as an individual employee, did not have the option under the labor contract of compelling arbitration of his grievance. That portion of the Company's Memorandum of Law in which it stated its position concerning the nature of the arbitration clause is attached hereto as Exhibit D.

The District Court dismissed the action on the ground that the Union had not exhausted its contractual

remedies (1-11). The Union then processed the grievance through the grievance procedure and requested arbitration (54). The Company offered to submit issues concerning the qualifications of identified individuals to arbitration, but received no response from the Union (68, 76-79).* The Union instead initiated Gangemi II to compel arbitration.

These background facts should enable the Court to place in better perspective the quoted excerpt in the Union's brief from the opinion of the District Court (U 6). The Union presented the quoted excerpt out of context in an attempt to convey the impression that the Company argued in Gangemi I that the parties were obligated to arbitrate their disputes. The Company did not so argue.** The Court is respectfully invited to examine the text of the Company's argument in Gangemi I, attached hereto as Exhibit D.

In summary, the Union does not dispute that it made sworn admissions which confirm conclusively the mutual

*The Company disagrees with the assertions of the Union concerning the merits of the underlying dispute (U 6-8). However, the Company will not respond concerning the merits as it would involve the Court improperly in a construction of the substantive provisions of the labor agreement. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 485, 46 LRRM 2416 (1960).

**In his Memorandum-Decision in Gangemi II, Judge Foley acknowledged that the Company's position was "strictly speaking, not inconsistent with their previous stand" (98). He recognized that the Company had always regarded arbitration non-mandatory with respect to non-disciplinary grievances.

understanding of the parties that non-disciplinary grievances are not subject to mandatory arbitration.* The order of the District Court in complete disregard of this evidence must be reversed.

*Although the Union does not dispute that it made these sworn admissions, it has shifted its position concerning the permissive nature of the arbitration clause. It now asserts, in a triumph of semantics over logic, that the arbitration clause is mandatory only at the option of the Union (U 18). In other words, the arbitration clause is mandatory for the Company but non-mandatory for the Union with respect to non-disciplinary grievances. The Union's position is untenable. It would preserve the Union's right to use economic power at its discretion to win a contract dispute, but simultaneously strip the Company of its discretion to use economic power. Such a scheme would take the "mutuality" out of labor relations. American Ship Building Co. v. NLRB, 380 U.S. 300, 309 (1965) (the right to bargain collectively "does not entail any 'right' to insist on one's position free from economic disadvantage.").

POINT II

THE PHRASE "WITH PRIOR WRITTEN MUTUAL AGREEMENT" IS THE CONTROLLING DIFFERENCE BETWEEN THE TWO PARAGRAPHS OF THE ARBITRATION CLAUSE.

The Union argues that the differences between the two paragraphs of the arbitration clause do not relate, in any way, to whether arbitration is mandatory or voluntary (U 12,13). The argument is without merit.

The Union's list of differences is selective (U 1[illegible]). It overlooks the most pertinent and obvious difference between the two paragraphs. Whereas grievances under the first paragraph involving the interpretation and meaning of the Agreement may be submitted to arbitration only "with prior written mutual agreement" of the parties, there is no such requirement in the second paragraph dealing with arbitration of disciplinary grievances (23).

The meaning of the requirement for mutual agreement - and the resulting difference between the two paragraphs - is absolutely clear. While grievances concerning disciplinary matters may be submitted to arbitration by either party once they have been processed through the grievance procedure, grievances involving the interpretation and application of a provision of the agreement may not be submitted to arbitration unless both parties agree in writing.

Even one of the differences the Union does note relates to the voluntary nature of the arbitration clause. While the second or "disciplinary" paragraph of the arbitration clause requires a written request for arbitration to be served within 30 days after the Company renders its final decision under Step 3 of the grievance procedure, the first or "non-disciplinary" paragraph contains no time limitations. One reason for this difference is that a time limitation for the arbitration of non-disciplinary grievances would be meaningless because either party can refuse to arbitrate at any time in any event.

The Union argues that "prior written mutual agreement" is the complement of the "just cause" standard in the second paragraph (U 16). However, it is apparent that no such parallel exists. "Just cause" is a meaningful standard which an arbitrator can apply in imposing a penalty. "Prior written mutual agreement" provides no such meaningful standard. The two phrases were obviously intended to serve two entirely different functions.

POINT III

BECAUSE THE DISTRICT COURT FOUND, AND THE UNION CONCEDED, THAT THERE WAS AMBIGUITY IN THE ARBITRATION CLAUSE, EVIDENCE OF THE PARTIES' BARGAINING HISTORY, CONTRACT ADMINISTRATION AND SWORN ADMISSIONS WAS RELEVANT TO AID THE COURT IN RESOLVING THE ALLEGED AMBIGUITY.

Although the Company maintains that the arbitration clause clearly provides for voluntary arbitration of non-disciplinary grievances, the District Court found the arbitration clause ambiguous in this respect:

> "In terms of the literal requirement of written authorization of Article IV which calls for arbitration, undoubtedly it can be read in different ways -- both as mandatory and permissive. For example, it could be read as an articulation of the principle that an individual grievant cannot force the principal parties, i.e., G.E. and the Union, to arbitrate a dispute which neither wants to arbitrate. See Black-Clawson Co., Inc. v. International Ass'n of Mach., 313 F.2d 179 (2d Cir. 1962). Or, it could be read to mean that compulsory arbitration can only be had after exhaustion of grievance procedures and the obligation that the parties come to some basic agreement on the issues, etc., in writing. United Aircraft Corp. v. Canel Lodge No. 700, I.A. of M. & A. W., 314 F. Supp. 371, 375 (D. Conn. 1970); aff'd 436 F.2d 1 (2d Cir. 1970), cert. denied, 402 U.S. 908 (1971)" (100-101).

Furthermore, the Union argues at one point that the word "may" in the arbitration clause is ambiguous (U 15).

In Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 61 LRRM 2001 (2nd Cir. 1965), this Circuit made clear that a court has the duty to consider proferred proof relevant to the intentions of the parties, such as the bargaining history and sworn admissions herein, if "neither of two proferred interpretations of an exclusionary clause, one of which would permit arbitration, the other of which would prevent it, is frivolous or unreasonable on its face." A court would not be able to state with assurance that a matter was not intended to be arbitrable until it had done so.

Accordingly, the Union's contention that the bargaining and administrative histories are irrelevant is erroneous. See Strauss v. Silvercup Bakers, Inc., supra; Accord, Local 81 v. Western Electric Co., 508 F.2d 106, 88 LRRM 2081 (7th Cir. 1974); Independent Petroleum Workers of America v. American Oil Co., 324 F.2d 903, 54 LRRM 2598 (7th Cir. 1963), aff'd by equally divided court, 379 U.S. 130, 85 S. Ct. 271, 57 LRRM 2512 (1964); Pacific Northwest Bell Telephone Co. v. Communication Workers, 310 F.2d 244, 51 LRRM 2405 (9th Cir. 1962), aff'd. after remand, 337 F.2d 455 (1964).

The Union contends alternatively that bargaining history is irrelevant because its proposals to alter the arbitration clause "were merely to change the language of the Agreement but not its meaning or intent" (U 28). A brief review of the evidence should enable the Court to dispose of this argument summarily.

In negotiating the 1963 contract, the Union proposed an arbitration clause which, if adopted, would have provided for mandatory arbitration of all unsettled grievances (70,83). The Company rejected this proposal and the clause ultimately included by the parties provided for arbitration only with prior written mutual agreement of the Association and the Company (70, 84-85).

In negotiations leading to the 1966-69 agreement, the parties agreed to provide for mandatory arbitration of all grievances involving disciplinary penalties, but retained the option for either party to refuse to agree to arbitrate grievances involving other issues (70-71, 86). Since then, notwithstanding proposals by the Union to modify the clause, the arbitration provisions have remained the same.

In the 1969, 1972 and 1973 negotiations, the Union sought to broaden the scope of the arbitration clause, but was unsuccessful (71, 87-90). For example, in 1972 the

Union sought unsuccessfully to modify the arbitration clause to "allow for arbitration of grievances for seniority, decreasing forces, increasing forces, continuity of service, subcontracting and loss of pay the same as for disciplinary action." (emphasis added) (71, 89)

In view of this evidence, it is respectfully submitted that the Union is being less than candid with the Court in asserting for the first time before this Court that it always understood arbitration of non-disciplinary grievances to be mandatory (U . 8). The Court's attention is respectfully directed to the actual language of the various Union proposals as set forth in the Appendix. An examination of the proposals will confirm that they were intended to produce significant substantive changes and not mere technical clarifications.

In short, the parties' bargaining and administrative histories and the Union's sworn admissions are relevant evidence which confirm conclusively that the parties intended and understood the arbitration clause to be permissive with respect to non-disciplinary grievances. The District Court must be reversed for failure to consider

such evidence.*

*It was unnecessary for the District Court to conduct a trial on the merits (U 27 footnote). The Company submitted conclusive evidence relative to sworn party admissions, bargaining history and contract administration to the District Court but the Court entirely disregarded the evidence. The District Court should have decided, and this Court can decide, this case on the basis of that evidence alone.

POINT IV

THE DISTRICT COURT ERRED BY IMPROPERLY DEFERRING THE ISSUE OF SUBSTANTIVE ARBITRABILITY

After acknowledging that the arbitration clause might be construed as either mandatory or permissive, the District Court stated in its Memorandum-Decisicn and Order:

> "Its true meaning, as I stated in the previous decision, is penultimately for the arbitrator and only thereafter for a federal court ...." (A 101).

The Union's brief shed no light on this apparent referral by the District Court to an arbitrator of the question of substantive arbitrability. A failure by the District Court to decide this issue constitutes reversible error. John Wiley & Sons v. Livingston, 376 U.S. 543, 547, 84 S. Ct. 909, 913, 55 LRRM 2769, 2771 (1964).

CONCLUSION

For all of the foregoing reasons and authorities, it is respectfully submitted that the order of the District Court compelling arbitration should be reversed.

DATED: December 4, 1975

Respectfully submitted,

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Telephone: (315) 422-0121

Of Counsel: Francis D. Price, Esq.
L. Lawrence Tully, Esq.

EXHIBIT A – Affidavit in Support of the Temporary Restraining Order, Application for a Preliminary Injunction, and Summons and Complaint.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THOMAS C. GANGEMI, as President of the Syracuse Draftsmen's Association 7210 Willow Road North Syracuse, New York 13212 Plaintiff, -vs- GENERAL ELECTRIC COMPANY Electronics Parkway Liverpool, New York 13088 Defendant.	AFFIDAVIT IN SUPPORT OF THE TEMPORARY RESTRAINING ORDER, APPLICATION FOR A PRELIMINARY INJUNCTION, AND SUMMONS AND COMPLAINT Index No. _____

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

THOMAS C. GANGEMI, being duly sworn, deposes and states the following:

1. That the Syracuse Draftsmen's Association at all times hereinafter mentioned was and still is an unincorporated labor organization consisting of more than seven members duly organized and existing under and by virtue of the laws of New York State and the United States and that deponent is the President of the Syracuse Draftsmen's Association and is fully familiar with the facts herein.

2. That the General Electric Company at all times hereinafter mentioned was and still is a corporation transacting business in New York State with an office located at Electronics Parkway,

EXHIBIT A — Affidavit in Support of the Temporary Restraining Order, Application for a Preliminary Injunction, and Summons and Complaint.

Liverpool, New York 13088.

3. That the General Electric Company recognized the Syracuse Draftsmen's Association as the collective bargaining representative of a bargaining unit including certain draftsmen employed in Central New York. Thereafter, the parties entered into negotiations and entered into several written Collective Bargaining Agreements, the most current of which is attached hereto and made part hereof as Exhibit "A".

4. That Article IX of the parties Collective Bargaining Agreement establishes the procedure for the decreasing of forces of bargaining unit employees. That basically lay offs are to be by seniority within classifications. That a draftsmen given a lack of work notice has the option to "bump" a draftsmen with less seniority within his classification or in a lower classification, initially within his department, and then within the remaining bargaining unit regardless of which department. That any draftsmen who will be affected by a lack of work will be given a minimum of two weeks written notice.

5. That on or about November 1, 1974, the Defendant issued simultaneously written notices to bargaining employees in Defendant's HMES department, to wit: 32 lack of work notices and approximately 33 displacement notices.

6. That there are approximately 7 draftsmen (employees Bognaski, Casler, Hores, Pandelly, Pisegna, Vecchio, and Vrabel) in the Defendant's HMES department having the same classifications

EXHIBIT A — Affidavit in Support of the Temporary Restraining Order, Application for a Preliminary Injunction, and Summons and Complaint.

and with less seniority than some of the 65 draftsmen who received the above described lack of work notices and displacement notices.

7. That as a result of these 7 draftsmen receiving "super seniority" status, approximately 17 draftsmen will have their assignments changed and salaries reduced that would not incur such a change or salary reduction if the proper contractual procedure were followed.

8. That none of the draftsmen who received a displacement notice on or about November 1, 1974 have been displaced and therefore have not at the present time been affected by a lack of work. That until one of these draftsmen have been bumped by a more senior draftsmen, no displacement notice should be issued. Attached hereto as Exhibit "B" is a sample copy of the displacement notices issued on or about November 1, 1974. This and the other similar displacement notices state "Displaced by Longer Service Employee." (emphasis added). That deponent respectfully points out to the Court that none of the 32 draftsmen receiving a lack of work notice has at the present time exercised his "bumping" rights.

9. That the defendant has informed the plaintiff that those draftsmen who on or about November 1, 1974 received a displacement notice will have until November 15, 1974 to exercise their option relative to the "bumping" procedure.

10. That the draftsmen who received the displacement notices on or about November 1, 1974 and who will actually be bumped by a more senior draftsmen sometime after November 1, 1974, will not

EXHIBIT A — Affidavit in Support of the Temporary Restraining Order, Application for a Preliminary Injunction, and Summons and Complaint.

have had the contractual minimum of two weeks written notice from the time that they are affected by a lack of work, if they are required to make such a decision by November 15, 1974.

11. That the plaintiff has no adequate remedy at law, or otherwise, for the harm and damage done or threatened to be done by the defendant because there is no binding arbitration provision contained in the parties Collective Bargaining Agreement with respect to this matter. That the only remedy available on this matter may be the instant lawsuit.

12. That irreparable harm, damage, and injury will follow and be done to the plaintiff and certain of its members unless the acts and conduct of the defendant above complained of are enjoined with respect to inter alia, the granting of "super seniority" and failure to give a minimum two weeks written notice to those draftsmen affected by a lack of work.

13. That no previous application has been made for the relief requested herein.

Thomas C. Gangemi

THOMAS C. GANGEMI

Sworn to before me this 13th day of November, 1974.

James R. LaVaute

Notary Public

JAMES R. LaVAUTE
Notary Public in the State of New York
Qualified in Ont. Co. by [illegible]
My Commission Expires March 30, [illegible]

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS C. GANGEMI, as President of the Syracuse Draftsmen's Association, Plaintiff, -vs- GENERAL ELECTRIC COMPANY, Defendant.	CROSS NOTICE OF MOTION FOR A PRELIMINARY INJUNCTION AND/OR TO REMAND Civil Action No. 74-CV-[illegible]2

TO: Bond, Schoeneck & King, Esqs.
Attorneys for Defendant
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

PLEASE TAKE NOTICE that upon the annexed Affidavit of Thomas C. Gangemi, and upon all the prior proceedings had herein, the undersigned will move this Court in Federal Court at a term to be held in the Federal Court House in the City of Albany, New York on January 6, 1975 at 10:00 a.m., or as soon thereafter as counsel can be heard for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure for (1) an injunction enjoining the Defendant from laying off and/or displacing and/or changing the assignment of any of the approximately 65 draftsmen who received a lay off and/or displacment notice on or about November 1, 1974, and from violating the parties' Collective Bargaining Agreement with reference to a decreasing of forces and taking the necessary action to remedy any such lay off and/or displacement which may have already occurred relative to this matter; and (2) in the alternative, remanding the instant matter back to the Supreme Court for the State of New York in and for the County of Onondaga, together with such other and further relief as this Court may

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

deem just and proper.

DATED: December 31, 1974

BLITMAN AND KING

By: Charles E. Blitman
Charles E. Blitman

Attorneys for the Plaintiff
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351 South Warren Street
Syracuse, New York 13202

Telephone: (315) 422-7111

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS C. GANGEMI, as President of the Syracuse Draftsmen's Association, Plaintiff, -vs- GENERAL ELECTRIC COMPANY, Defendant.	AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTIONS Civil Action No. 74-CV-492

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

THOMAS C. GANGEMI, being duly sworn, deposes and says that:

1. The Syracuse Draftsmen's Association, at all times hereinafter mentioned, was and still is an unincorporated labor organization consisting of more than 7 members duly organized and existing under and by virtue of the laws of the State of New York and the United States and that deponent is President of the Syracuse Draftmen's Association and is fully familiar with the facts herein.

2. The General Electric Company, at all times hereinafter mentioned, was and still is a corporation transacting business in the State of New York with an office located at Electronics Parkway, Liverpool, New York.

3. The General Electric Company recognized the Syracuse Draftsmen's Association as the collective bargaining representative of a bargaining unit consisting of certain draftsmen employed in Central New York. Thereafter, the parties entered into several written Collective Bargaining Agreements, the most current of which is attached to the Complaint in this proceeding as Exhibit "A".

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

4. The Honorable Richard Aronson, Justice of the Supreme Court for the State of New York in and for the County of Onondaga, executed an Order to Show Cause on motion for a preliminary injunction with a Temporary Restraining Order on the 14th day of November, 1974, said motion returnable the 18th day of November, 1974 in Syracuse, New York. On the 15th day of November, 1974, the General Electric Company was served with a copy of the aforementioned Order to Show Cause on motion for a preliminary injunction with a Temporary Restraining Order, supporting affidavits and exhibits, Summons and Complaint seeking a Permanent Injunction with respect to the Defendant laying off and/or changing the assignment of any of the 65 draftsmen who received lay off and/or displacement notices on or about November 1, 1974.

5. On or about the 14th day of November, 1974, the Honorable Richard Aronson, J.S.C., vacated the aforementioned Temporary Restraining Order. Attorneys for the parties appeared at Supreme Court, Syracuse, New York on November 18, 1974. At that time the matter was placed on the trial calendar to be reached on or about November 27, 1974. Plaintiff's attorneys, as ordered, prior to this trial date, filed a trial note of issue. Thereafter, Defendant on the 25th day of November, 1974 filed a Petition and Bond for Removal in this matter with the United States District Court for the Northern District of New York. Thereafter, the Defendant moved to dismiss Plaintiff's action. The instant Affidavit is in opposition to Defendant's motions and in support of Plaintiff's instant motions.

6. That Article IX of the parties Collective Bargaining Agreement establishes the procedure for the decreasing of forces of bargaining unit employees. That basically lay offs are to be by seniority within classifications. That a draftsman given a lack of work notice has the option to "bump" a draftsman with less

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

seniority within his classification or in a lower classification, initially within his department, and then within the remaining bargaining unit regardless of which department. That any draftsman who will be affected by a lack of work will be given a minimum of two weeks written notice.

7. That on or about November 1, 1974, the Defendant issued simultaneously written notices to bargaining employees in Defendant's HMES department, to wit: 32 lack of work notices and approximately 33 displacement notic

8. That there were approximately 7 draftsmen (employees Bognaski, Casler, Hores, Pandelly, Pisegna, Vecchio, and Vrabel) in the Defendant's HMES department having the same classifications and with less seniority than some of the 65 draftsmen who received the above described lack of work notices and displacement notices.

9. That as a result of these 7 draftsmen receiving "super seniority" status, approximately 17 draftsmen have had their assignments changed and salaries reduced that would not have incurred such a change or salary reduction if the proper contractual procedure was followed.

10. That none of the draftsmen who received a displacement notice on or about November 1, 1974 were displaced by November 14, 1974 and therefore at that time had not been affected by a lack of work. That until one of these draftsmen were bumped by a more senior draftsmen, no displacement notice should be issued. That on or about November 14, 1974, all draftsmen having been issued a lack of work notice then exercised their option to bump, thereby notifying certain draftsmen that they would be displaced. At that point in time, these draftsmen receiving such displacement notification should have, pursuant to the parties' Collective Bargaining Agreement, been given a two week period within which to make his/her's decision relative to a continuation of the bumping process

EXHIBIT B — Cross Notice of Motion for a Preliminary Injunction and/or to Remand with Affidavit of Thomas C. Gangemi annexed.

and/or taking a lay off.

11. That the draftsmen who received the displacement notices on or about November 1, 1974 and who actually were bumped by more senior draftsmen on or about November 14, 1974, did not receive the contractual minimum of two weeks written notice from the time that they are affected by a lack of work.

12. That deponent has been informed by his attorneys, that Plaintiff has no adequate remedy at law and that the harm or damage done is irreparable.

13. Deponent incorporates herein by reference the Affidavit of Robert E. Casler, sworn to the 13th day of November, 1974 and attached to Plaintiff's aforementioned Order to Show Cause in the State Court action, a copy of which is attached hereto and made a part hereof as Exhibit "I".

14. That deponent respectfully points out to the Court that he has been informed by his attorneys that the Syracuse Draftsmen's Association and its members have been irreparably harmed and that no adequate remedy at law exists. That this is based upon the loss of jobs, income, lack of adherence to the parties' Collective Bargaining Agreement, effectuation of the policies of the Federal Labor Law, and the loss of the vesting of certain pension benefits, severence pay, medical benefits, life insurance and unemployment insurance benefits together with the Defendant's Income Extension Aid program.

15. Articles III and IV of the parties' Collective Bargaining Agreement is a form of a grievance-arbitration clause. Feeling aggrieved, the Syracuse Draftsmen's Association on or about November 5, 1974 submitted a grievance with respect to the aforementioned 7 draftsmen receiving super seniority in violation of the parties' Collective Bargaining Agreement. Because of the nature of the grievance, it would immediately proceed to Step 2

of the grievance procedure. A Step 2 grievance meeting was held on November 15, 1974. On December 5, 1974, the Syracuse Draftsmen's Association notified the Defendant that a settlement had not been reached and that the Association referred the grievance to Step 3 of the Grievance Procedure. A Step 3 grievance meeting was held on December 19, 1974. The parties were unable to resolve their differences at this meeting. Consequently, the Syracuse Draftsmen's Association at this meeting on December 19, 1974 specifically requested that the matter proceed to arbitration. John P. Davern, Negotiator-Union Relations Representative of the Defendant, denied at that time the Plaintiff's demand to proceed to arbitration. The deponent respectfully points out to the Court that pursuant to Article IV of the parties' Collective Bargaining Agreement, any grievance, excluding a disciplinary penalty, may not proceed to arbitration unless both parties mutually agree in writing. On December 19, 1974, the Syracuse Draftsmen's Association was ready, willing and able to submit this grievance to arbitration. The Defendant's representative, refused to have the matter submitted to arbitration. Therefore the grievance-arbitration clauses of the parties Collective Bargaining Agreement have been exhausted.

16. Defendant in its motion papers moves to dismiss Plaintiff's action on the grounds that, inter alia, the parties' Collective Bargaining Agreement provides the exclusive remedy for alleged breaches of the Agreement and that the Plaintiff has failed to exhaust the contractual remedies for alleged breaches of the contract. Deponent respectfully points out to the Court that it has exhausted the grievance procedure and the Defendant has refused to proceed to arbitration. Furthermore, deponent respectfully points out to the Court, that the grievance-arbitration clauses of the parties' Collective Bargaining Agreement do not

provide for the exclusive remedy for alleged breaches of the contract.

17. That the deponent respectfully requests that a preliminary injunction be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure, and if the Court so determines, that a hearing date be established with respect to taking evidence in this matter at the Court's earliest convenience. In the alternative, deponent respectfully requests that the instant matter be remanded to the Supreme Court of the State of New York in and for the County of Onondaga.

WHEREFORE, deponent respectfully requests that Defendant's motion to dismiss the Complaint be denied, that a preliminary injunction be granted, or in the alternative, that a hearing be established at the Court's convenience with respect to Plaintiff's application for a preliminary injunction, or in the alternative, that the instant matter be remanded back to the Supreme Court of the State of New York in and for the County of Onondaga, together with such other and further relief as this Court may deem just and proper in the premises.

Thomas C. Gangemi
THOMAS C. GANGEMI

Sworn to before me this 31st
day of December, 1974.

Lora M. Eiholzer
Notary Public

LORA M. EIHOLZER
Notary Public in the State of New York
Qualified in Onon. Co. No. 24-4620310
My Commission Expires March 30, 1975

EXHIBIT C – Complaint.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THOMAS C. GANGEMI, as President of the Syracuse Draftsmen's Association 7210 Willow Road North Syracuse, New York 13212 Plaintiff, -vs- GENERAL ELECTRIC COMPANY Electronics Parkway Liverpool, New York 13088 Defendant.	C O M P L A I N T Index No. _____

The plaintiff complains of the defendant, and for a cause of action alleges:

1. That the Syracuse Draftsmen's Association at all times hereinafter mentioned was and still is an unincorporated labor organization consisting of more than seven members duly organized and existing under and by virtue of the laws of New York State and the United States. Thomas C. Gangemi is President of said Syracuse Draftsmen's Association.

2. That the General Electric Company at all times hereinafter mentioned was and still is a corporation transacting business in New York State with an office located at Electronics Parkway, Liverpool, New York 13088.

3. That the parties entered into a written Collective Bargaining Agreement, a copy of which is attached as Exhibit "A", concerning wages, hours and working conditions for a bargaining

unit, including draftsmen, employed by the defendant in Central New York.

4. That Article IX of the parties Collective Bargaining Agreement establishes the procedure for the decreasing of forces of bargaining unit employees. That basically lay offs are to be by seniority within classifications. That a draftsmen given a lack of work notice has the option to "bump" a draftsmen with less seniority within his classification or in a lower classification, intially within his department, and then within the remaining bargaining unit regardless of which department. That any draftsmen who will be affected by a lack of work will be given a minimum of two weeks written notice.

5. That on or about November 1, 1974, the Defendant issued simultaneously written notices to bargaining unit employees in Defendant's HMES department, to wit: 32 lack of work notices and approximately 33 displacement notices.

6. That there are approximately 7 draftsmen in the Defendant's HMES department having the same classifications and with less seniority than some of the 65 draftsmen who received the above described lack of work notices and displacement notices.

7. That as a result of these 7 draftsmen receiving "super seniority" status, approximately 17 draftsmen will have their assignments changed and salaries reduced that would not incur such a change or salary reduction if the proper contractual procedure were followed.

8. That none of the draftsmen who received a displacement notice on or about November 1, 1974 have been displaced and therefore have not at the present time been affected by a lack of work. That until one of these draftsmen have been bumped by a more senior draftsmen, no displacement notice should be issued. Attached hereto as Exhibit "B" is a sample copy of the displacement notices issued on or about November 1, 1974. This and the other similar displacement notices state "Displaced by Longer Service Employee." (emphasis added).

9. That the defendant has informed the plaintiff that those draftsmen who on or about November 1, 1974 received a displacement notice will have until November 15, 1974 to exercise their option relative to the "bumping" procedure.

10. That the draftsmen who received the displacement notices on or about November 1, 1974 and who will actually be bumped by a more senior draftsmen sometime after November 1, 1974, will not have had the contractual minimum two weeks written notice from the time that they are affected by a lack of work, if they are required to make such a decision by November 15, 1974.

11. That the plaintiff has no adequate remedy at law, or otherwise, for the harm and damage done or threatened to be done by the defendant because there is no binding arbitration provision contained in the parties Collective Bargaining Agreement with respect to this matter. That the only remedy available on this matter may be the instant lawsuit.

12. That irreparable harm, damage, and injury will follow and be done to the plaintiff and certain of its members unless the acts and conduct of the defendant above complained of are enjoined with respect to inter alia, the granting of "super seniority" and failure to give a minimum two weeks written notice to those draftsmen affected by a lack of work.

WHEREFORE, plaintiff respectfully prays that the defendant be permanently enjoined and restrained from laying off and/or changing the assignment of any of the 65 draftsmen who received lay off and/or displacement notices on or about November 1, 1974 together with such other and further relief as this Court may deem just and proper.

BLITMAN AND KING
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351 South Warren Street
Syracuse, New York 13202

Telephone: (315) 422-7111

EXHIBIT C — Complaint.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

THOMAS C. GANGEMI, being duly sworn, deposes and says that deponent is the President of the Syracuse Draftsmen's Association, a plaintiff in the within action; that deponent has read the foregoing Complaint and knows contents thereof· that the same is true to deponent's own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to true.

Thomas C. Gangemi
THOMAS C. GANGEMI

Sworn to before me this 13th
day of November, 1974.

James R. LaVallie
Notary Public

JAMES R. LaVALLIE
Notary Public in the State of New York
Qualified in Onon. Co. No. 24-4705127
My Commission Expires March 30, 1975

EXHIBIT D – Defendant's Memorandum in Support of Motion to Dismiss the Complaint.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS C. GANGEMI, as President of the Syracuse Draftmen's Association,

Plaintiff

-vs-

CIVIL ACTION NO. 74-CV-492

GENERAL ELECTRIC COMPANY,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

POINT III

PLAINTIFF IS BARRED FROM INSTITUTING THIS LAWSUIT, SINCE IT HAS NEITHER EXHAUSTED ITS CONTRACTUAL REMEDIES NOR ATTEMPTED TO DO SO AND FOUND THEM INEFFECTIVE

Assuming, solely for the sake of argument, that the availability of contractual remedies is not an absolute bar to this action, plaintiff must nevertheless have either exhausted those remedies or be prepared to show that it attempted to exhaust them and found them ineffective.

The cases are legion in which courts have held that a grievant must exhaust contractual grievance and arbitration procedures prior to seeking court relief. Republic Steel v. Maddox, 379 U.S. 650, S.Ct. 614 (1965); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967); Provenzino v. Merchants Forwarding, 363 F.Supp. 168, 173-174 (D.C. Mich., 1973); Butler v. Yellow Freight System, Inc., 374 F.Supp. 747 (D.C. Mo., 1974).

Plaintiff would distinguish these cases on the basis of its claim that the agreement in the instant action does not contain a binding arbitration provision (Complaint, par. 11). This claim is erroneous. Although the arbitration clause is "permissive" rather than "mandatory", the award of an arbitrator issued with respect to any grievance which the parties consent to have arbitrated is ". . . final and binding upon all parties to this Agreement . . ."

(Complaint, Exhibit "A", Article IV, par. 3). Defendant contends that in the absence of a showing that resort to the grievance and arbitration procedures would be futile, plaintiff must exhaust the remedies available in those procedures before seeking court relief. To hold otherwise would render the grievance and arbitration procedures a meaningless device which the plaintiff might or might not choose to follow, at its whim. Such a holding is plainly contrary to the dictates of Congressional policy, as embodied in the Labor Management Relations Act of 1947.

In Republic Steel v. Maddox, supra, the Supreme Court was faced with a claim that an employee need not follow the prescribed grievance procedures if he had reason to believe that the union would not press his grievance. Rejecting this claim, the Court stated:

> As a general rule in cases to which federal labor law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. (Emphasis in original)
>
> * * *
>
> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant.

EXHIBIT D — Defendant's Memorandum in Support of Motion to Dismiss the Complaint.

* * *

> And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so. 379 U.S. at 652-653.

Defendant perceives no meaningful distinction between a claim that the grievance procedure is ineffective because the union will not pursue it and a claim that an arbitration procedure is ineffective because one party may not consent to arbitration. In either case the grievance procedure may not produce a final and binding result, but grievant must at least be required to attempt to resolve the dispute within the contractually agreed-upon framework before being permitted to institute litigation.

The lack of distinction is especially clear in view of the holding in Vaca v. Sipes, supra, that an employee must attempt to exhaust the grievance procedures in a collective bargaining contract before bringing an action based on breach of contract, notwithstanding the fact that he, as an individual employee, did not have the option under the contract of compelling arbitration of his grievance. See 386 U.S. at 191.

In Republic Steel v. Maddox, supra, grievant further alleged that since the contract stated that grievant "may discuss" a grievance with his foreman, the contract was susceptible of an interpretation that the grievance proce-

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Re: **THOMAS C. GANGEMI, as President of the SYRACUSE DRAFTMEN'S ASSOCIATION v. GENERAL ELECTRIC CO.**

State of New York)
County of Onondaga) ss.:
City of Syracuse)

EVERETT J. REA,

Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York and is over twenty-one years of age.

That at the request of **FRANCIS D. PRICE, ESQ., Partner BOND, SCHOENECK & KING,**

Attorney(s) for **Appellant,**

he personally served **two (2)** copies of the printed ☐ Record ☒ Reply Brief ☐ Appendix of the above entitled case addressed to:

CHARLES E. BLITMAN, ESQ.
BLITMAN & KING
Attorneys at Law
500 Chamber Bldg.
351 S. Warren St.
Syracuse, N. Y. 13202

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York.

☐ By hand delivery

Everett J. Rea
Everett J. Rea

Sworn to before me this **5th** day of **December, 1975.**

Ruth S. Molloy
Commissioner of Deeds

cc: Francis D. Price, Esq.
Bond, Schoeneck & King